

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 760 of 1997

Shri Mhamulal Husen Momin ..Appellant
(Orig.plaintiff)

V/s

1. Gulmahamad Babalal Satarmaker
2. Mahirajbi Babalal Satarmaker
3. Rafik Babalal Satarmaker
4. Ekabal Babalal Satarmaker
5. Baby Ayesha Babalal
6. Khurshidbi Mansur Maher
7. Rubeda Ibrahim Attar ... Respondents
(Orig.defendants)

Shri S.V.Sadavarte for Appellant

Shri C.G.Gavnekar for Respondent no.1

CORAM: S.R.SATHE, J.

DATED:16th August 2005

ORAL JUDGMENT :-

1. The Appellant original plaintiff in Regular Civil Suit No.312 of 1982 has preferred this Second Appeal against the judgment and order passed by the Court of 5th

Additional District Judge, Kolhapur whereby the order passed by the trial Court dismissing the plaintiff's suit for declaration and injunction was confirmed and the first appeal was dismissed.

2. Brief facts giving rise to this appeal are as under :

. The suit property bearing City Survey NO.251/A, C Ward of Kolhapur was initially owned by one Babalal Satarmaker. He died on 27-5-1962 leaving behind son viz. Gulamahamad B. Satarmaker and Mahirajbi, step mother of Gulamahamad and 2 step brothers. Gulamahamad and other heirs of Babalal had taken an amount of Rs.1,000/- from the present Appellant Mhamulal Husen Momin on 9-6-1966. they had again taken an amount of Rs.2960/-. Thus they had received in all Rs.3960/-. For the said amount Gulamahamad and others executed registered mortgage deed in favour of the present Appellant and he was put in possession of the suit property admeasuring 22'x 8'. As per terms and conditions of the said mortgage deed the Appellant mortgagee was to return the possession after the period of 3 years. However, few days prior to expiry of period of 3 years, Mahirajbi and others i.e. original defendant nos.2 to 7 executed a rent note in favour of the present Appellant and agreed that present Appellant should continue his possession of the suit premises as a tenant at monthly rent of Rs.110/-. According to the Appellant his name was also entered in municipal record as a tenant of the said premises. He also paid rent of their shares

to defendant nos.2 to 7. However, defendant no.1 Gulmahamad filed Regular Civil Suit NO.648 of 1981 for possession and means profit and claimed possession of suit premises from the plaintiff. Not only that but he obstructed Appellant's peaceful possession of the suit premises. Hence the present Appellant filed Regular Civil suit no.312 of 1982 and sought declaration that he is in possession of the suit premises as a tenant. He also prayed for permanent injunction restraining the defendants from obstructing his possession of the suit premises.

3. The Respondent no.1 (original defendant no.1) filed his written statement at Exh.20 and opposed the suit claim. He admitted execution of the mortgage deed but denied the Appellant's allegations that said premises was given to him as a tenant. Defendant no.1 further contended that as the original transaction between him and appellant is of mortgage he is having a right of redemption.

He also contended that the Appellant was in possession for a period of 3 years and after expiry of the said period the Appellant has no right to remain in possession. In fact for that purpose the defendant no.1 filed Regular Civil Suit NO.648 of 1981 and claimed possession of the suit property. According to him, in order to give go
bye

to the said suit and to bring pressure on him,
the

Appellant filed Regular Civil Suit NO.312 of 1982. The

defendant no.1 therefore, prayed for dismissal of the suit.

4. Defendant nos.2 to 5 and 7 filed their Written Statement at exh.21 and took similar contentions.

5. On the pleadings of the parties the trial Court framed issues at Exh.22. In order to prove his suit claim the present Appellant examined himself at Exh.51 and also

produced the rent note at Exh.52. He also produced certain other documents including rent receipts and the property extract. As against this, the original defendant no.1 Gulmahamad B. Satarmaker examined himself at exh.54. After considering the evidence adduced by both the parties the trial Judge came to the conclusion that though defendant nos 2 to 5 and 7 had executed a rent note in favour of the present Appellant the same was not legal and valid and that had in fact affected the mortgagor's right of redemption. The trial Court came to the conclusion that though Appellant is in possession of the suit premises he cannot said to be a tenant. The trial Court also observed that the defendants had at no point of time

obstructed the Appellant original plaintiff in his peaceful enjoyment of the suit property and as such there was in fact no cause of action for the Appellant to file suit for declaration and injunction. The trial Court, therefore dismissed the suit.

6. Being aggrieved by the said order the original plaintiff filed Regular Civil Appeal no.37 of 1995 in the District Court,Kolhapur. However, the said appeal was also dismissed. Hence the original plaintiff filed the present Second appeal.

7. While admitting the Second Appeal this court has passed the following order :-

. "Admit.

. Grounds (A), (B), (C), (D) and (E) raise substantial questions of law."

. The said grounds read as under :-

A) Whether the learned trial Court erred in dismissing the suit of the appellant without giving any sufficient reasoning thereto and came to a wrong conclusion that the Appellant is not entitle for injunction?

B) Whether the trial Judge has misinterpreted the Rent Note at Exh.52 and the assessment list at Exh.59 which clearly entitled the Appellant the reliefs sought by him in the suit?

C) Whether the learned trial Court erred in observing that Section 10 of Civil Procedure Code comes in the

way of appellant in passing a decree in his favour?

D) Whether the learned trial Judge failed to appreciate the Rent Note at Exh.52 and the fact that the said note was registered and the executant of the said note did not enter into witness box which clearly shows the reliability and genuineness of the document on which the right of Appellant establishes?

E) Whether the learned trial Court erred in observing that the appellant is in possession of the suit property as a trespassers, when the rent note and other documentary evidence was on record which clearly shows that Appellant is in possession of the suit property as a tenant?

7. In this appeal before me Shri Sadavarte, learned Advocate for the Appellant, original plaintiff submitted that by virtue of rent note executed by original defendant nos.2 to 5 and 7, the mortgage transaction between the parties has come to an end and tenancy has been created. As against this, Shri Gawanekar, learned Advocate for the Respondents-defendants submitted that rent note executed was not by all mortgagors but some of the mortgagors had executed the same and it would not bind to those who are not party to it. Besides this he also submitted that execution of such rent note amounts to clog on redemption and as such Appellant plaintiff is not entitled to take benefit of it. Both the learned Advocates also fairly

submitted that fate of this appeal depends mainly on the decision of other Second appeal bearing No.755 of 1997, filed by the present Appellant original defendant wherein decree for possession passed against the Appellant is challenged by him.

8. The execution of the mortgage deed Exh.42 is not in dispute. It is also an admitted fact that by virtue of stipulation embodied in the said mortgage deed the mortgagee was put in possession and it was agreed that after the completion of 3 years period the mortgagee should return the possession to the mortgagor. If we see the rent note Exh.52 produced by the appellant it is very clear that original defendant no.1 Gulmahamad B. Satarmaker is not party to the said document. It has also come on record that at no point of time he admitted the present Appellant as a tenant. It appears that the other co-mortgagors by joining hand with the mortgagee executed a rent note but such document cannot take away the rights of redemption of co-mortgagor. We cannot ignore the well settled position of law that "once a mortgage is always a mortgage". So, under such circumstances the rent note or agreement of lease has in fact created a clog on redemption. So, said rent note shall have to be ignored.

In fact having regard to this position, the Second Appeal No.755 of 1997 filed by the present Appellant has been dismissed and decree for possession passed against the

Appellant is confirmed by this court.

9. From the perusal of the evidence it is very clear that Appellant original plaintiff is in actual possession of the suit premises. However, as mentioned above the said possession is not as a tenant but as a mortgagee. There is absolutely no cogent and convincing evidence to show that defendants have obstructed plaintiff's peaceful possession of the suit premises. So, there was in fact no cause of action for the present Appellant to seek any injunction against the defendants.

10. Both the courts below have rightly considered the material on record and correctly held that the plaintiff is not entitled for declaration and injunction.

11. In this view of the matter there is no substance in this appeal. The appeal is dismissed with costs.

(S.R.SATHE, J.)